

State of South Dakota

EIGHTY-THIRD SESSION
LEGISLATIVE ASSEMBLY, 2008

400P0385

SENATE BILL NO. 53

Introduced by: The Committee on State Affairs at the request of the Department of Corrections

1 FOR AN ACT ENTITLED, An Act to revise certain provisions related to capital punishment.
2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 Section 1. That § 23A-27A-7 be amended to read as follows:

4 23A-27A-7. Upon a verdict or judgment of death made by a jury or a judge, ~~it shall be the~~
5 ~~duty of the judge presiding at the trial to~~ shall sentence ~~such the~~ convicted person to death and
6 ~~to make such the~~ sentence in writing, ~~which.~~ The judgment of death shall be filed with the
7 papers in the case against ~~such the~~ convicted person. ~~A certified copy thereof shall be sent by~~
8 ~~the clerk of the court in which the sentence is pronounced to the warden of the state penitentiary,~~
9 ~~not less than ten days prior to the time fixed in the sentence of the court for the execution of the~~
10 ~~sentence~~ and certified copies provided to the Governor, the secretary of corrections, the sheriff
11 of the county where the crime was committed, and the warden.

12 Section 2. That § 23A-27A-15 be amended to read as follows:

13 23A-27A-15. ~~When~~ Whenever judgment of death is rendered, the judge ~~must forthwith~~ shall
14 also sign and deliver to provide to the Governor, the secretary of corrections, the sheriff of the
15 county where the crime was committed, and the warden a warrant of death sentence and



1 execution, along with a brief statement of the facts and circumstances of the case, duly attested
2 by the clerk under the seal of the court stating. The warrant of death sentence and execution
3 shall describe the conviction and sentence and ~~appointing~~ appoint the week within which the
4 sentence ~~must~~ shall be executed. The warrant ~~must~~ of death sentence and execution shall be
5 directed to the warden of the state penitentiary at Sioux Falls, commanding the warden to
6 execute the sentence on some day within the week appointed.

7 Section 3. That § 23A-27A-16 be amended to read as follows:

8 23A-27A-16. Within ten days after the issuing of a warrant of death sentence and execution
9 under § 23A-27A-15, the sheriff ~~must~~ shall deliver the defendant together with certified copies
10 of the warrant of death sentence and execution and the judgment of conviction to the ~~warden~~
11 ~~or his deputies at the state penitentiary. From the time of delivery to the warden until the~~
12 ~~infliction of the punishment of death upon him, unless he is lawfully discharged from such~~
13 ~~imprisonment, the defendant shall be kept in solitary confinement at the penitentiary and no~~
14 ~~person shall be allowed access to him without an order of the trial court except the officers of~~
15 ~~the prison, his counsel, his physician, a priest or minister if he shall desire one, and the members~~
16 ~~of his family.~~

17 Section 4. That § 23A-27A-17 be amended to read as follows:

18 23A-27A-17. The week so appointed shall be not less than six months nor more than eight
19 months after the date of judgment of death. The time of execution within ~~such~~ the week shall
20 be left to the discretion of the warden to whom the warrant is directed, ~~who~~. The warden shall
21 cause the execution to be performed on some day of such week. Not less than forty-eight hours
22 prior to the execution, the warden shall make a public announcement of the scheduled day and
23 hour of the execution.

24 Section 5. That § 23A-27A-18 be repealed.

1 ~~23A-27A-18. The judge of any court imposing sentence of death shall immediately~~
2 ~~thereafter transmit by registered or certified mail to the Governor a certified copy of such~~
3 ~~judgment together with a brief statement of the facts and circumstances of the case over his~~
4 ~~signature.~~

5 Section 6. That § 23A-27A-19 be amended to read as follows:

6 23A-27A-19. The Governor may ~~thereupon~~ make such investigation of the case as ~~he~~ the
7 Governor may deem proper and may require the assistance of the attorney general.

8 Section 7. That § 23A-27A-20 be amended to read as follows:

9 23A-27A-20. The Governor ~~shall have power to~~ may reprieve or suspend the execution of
10 the sentence for such reasonable time as ~~he~~ the Governor may see fit for the purpose of
11 completing ~~his~~ an investigation or other like proper purpose but the period of reprieve or
12 suspension shall not in any event, exceed ninety days ~~except as provided in § 23A-27A-24 or~~
13 ~~23A-27A-28.~~

14 Section 8. That § 23A-27A-21 be amended to read as follows:

15 23A-27A-21. No judge, officer, commission, or board, other than the Governor, ~~can~~ may
16 reprieve or suspend the execution of a judgment of death ~~except where.~~ However, the warden
17 or deputy warden of the penitentiary is authorized so to do in a case and in the manner
18 prescribed in this chapter or as provided in sections 15 and 20 of this Act. This section does not
19 apply to a stay of proceedings upon appeal or to the issuance of a writ of habeas corpus,
20 certiorari, or other original remedial writ of the Supreme Court.

21 Section 9. That § 23A-27A-22 be amended to read as follows:

22 23A-27A-22. If a defendant confined under sentence of death ~~appears~~ does not appear to be
23 mentally ~~incompetent~~ competent to ~~proceed~~ be executed, the warden having custody of the
24 defendant shall ~~forthwith~~ notify the Governor, ~~who shall appoint a commission of not less than~~

~~three nor more than five disinterested duly licensed physicians, one of whom shall be the medical director of the Human Services Center or the director's designee, to examine the defendant and report to the Governor as to the defendant's mental condition at the time of the examination the secretary of corrections, and the sentencing court.~~

Section 10. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read as follows:

If the warden notifies the sentencing court that a defendant under a sentence of death does not appear to be mentally competent to be executed, or if the prosecuting attorney or the defense attorney moves for a determination of whether the defendant is mentally competent to be executed, the sentencing court shall conduct hearings and order mental examinations pursuant to this section and sections 11, 12, 13, and 14 of this Act. Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted pursuant to section 11 of this Act, and that a psychiatric report be filed with the court, pursuant to section 12 of this Act. The state has the burden of proving the mental competence of the defendant by a preponderance of the evidence. A defendant is mentally competent to be executed if the defendant is aware of the impending execution and the reason for it.

Section 11. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read as follows:

Any psychiatric examination ordered pursuant to section 10 of this Act shall be conducted by a licensed or certified psychiatrist, or, if the court finds it appropriate, by more than one such psychiatrist. Each psychiatrist shall be designated by the court. For the purposes of a psychiatric examination ordered pursuant to section 10 of this Act, the defendant shall remain confined under the physical custody of the Department of Corrections.

Section 12. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read

as follows:

Any psychiatric report ordered pursuant to section 10 of this Act shall be prepared by the psychiatrist designated to conduct the psychiatric examination, shall be filed with the court with copies provided to the counsel for the defendant and to the prosecuting attorney, and shall include:

- (1) The defendant's history and present symptoms;
- (2) A description of the psychiatric, psychological, and medical tests that were employed and their results; and
- (3) The psychiatrist's determination whether the defendant is mentally competent to be executed as defined in section 10 of this Act.

Section 13. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read as follows:

Upon written request of defense counsel, the court may order a video tape record made of the defendant's psychiatric examination conducted pursuant to section 10 of this Act. Either the prosecuting attorney or the defendant's counsel may request a copy of the video tape record. The video tape record shall be submitted to the court along with the psychiatric report, pursuant to section 12 of this Act.

Section 14. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read as follows:

At any hearing ordered pursuant to section 10 of this Act, the defendant shall be represented by counsel and, if financially unable to obtain adequate representation, counsel shall be appointed for the defendant. The defendant shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on the defendant's behalf, and to confront and cross-examine witnesses who appear at the hearing.

Section 15. That § 23A-27A-24 be amended to read as follows:

23A-27A-24. If the ~~commission~~ sentencing court finds the defendant is not mentally ~~incompetent~~ competent to ~~proceed~~ be executed the ~~Governor~~ sentencing court shall suspend the execution of sentence ~~and may in his discretion order the defendant removed to the Human Services Center, there to remain confined until he~~ the defendant is ~~no longer~~ mentally ~~ill~~ competent to be executed. The defendant shall remain confined under the physical custody of the Department of Corrections. The ~~commission~~ sentencing court shall review the defendant's mental condition at least once every six months during ~~his confinement~~ the period that the execution of sentence is suspended.

Section 16. That § 23A-27A-26 be amended to read as follows:

23A-27A-26. ~~The Governor, upon receiving the certificate provided for in § 23A-27A-25, that states~~ If the sentencing court determines the defendant is mentally competent to be executed, the sentencing court shall certify the fact to the Governor, the secretary of corrections, and the warden having custody of the defendant. The sentencing court, upon determination the defendant is no longer mentally incompetent competent to ~~proceed, must be executed, shall~~ issue his a warrant of death sentence and execution appointing a week beginning within a period of not less than thirty nor more than ninety days from the date of the warrant, for the execution of the defendant pursuant to ~~his~~ the defendant's sentence unless the sentence has been commuted or the defendant pardoned. ~~The defendant shall continue in or be returned to the custody of the warden of the state penitentiary accordingly. In no case may the appointed week of execution be sooner than the week appointed by the sentencing court pursuant to § 23A-27A-15.~~

Section 17. That § 23A-27A-23 be repealed.

~~23A-27A-23. The commission appointed pursuant to § 23A-27A-22 must summarily proceed to make the examination. Before commencing they must take the oath required of~~

1 referees as prescribed by the Supreme Court rule for trial courts of record. They shall give at
2 least seven days' notice of the time of such examination to the attorney general and to the state's
3 attorney who tried or participated in the trial of the defendant and to counsel for the defendant.
4 Either the attorney general or one of his assistants or the state's attorney or a deputy shall, and
5 counsel for defendant may, attend the examination and any of the attorneys may take part in the
6 proceedings before the commission. The commission shall have power to call and examine
7 witnesses, administer oaths, and compel the attendance of witnesses. When the commission has
8 concluded its examination it must forthwith report in writing to the Governor, setting forth the
9 facts found together with the opinion of the commission as to the mental condition of the
10 defendant.

11 Section 18. That § 23A-27A-25 be repealed.

12 — 23A-27A-25. When the commission determines that the defendant is no longer mentally
13 incompetent to proceed, it shall report the fact to the Governor and to the Chief Justice of the
14 Supreme Court. The Chief Justice shall thereupon inquire into the truth of the report in such
15 manner as he may deem proper and if the justice upholds the commission's report, he shall so
16 certify to the Governor and to the clerk of the court in which the defendant was convicted.
17 Thereupon the defendant shall be forthwith returned and delivered to the custody of the warden
18 of the state penitentiary, there to be dealt with according to law.

19 Section 19. That § 23A-27A-27 be amended to read as follows:

20 23A-27A-27. If there is reasonable ground to believe that a female defendant sentenced to
21 death is pregnant, the warden having her in custody shall ~~summon three disinterested licensed~~
22 ~~physicians of this state to examine~~ arrange for an examination of the defendant and inquire into
23 to determine her condition. ~~The physicians upon completing~~ Upon the completion of the
24 examination, the warden shall make a report in writing over ~~their signatures~~ the warden's

signature, stating the facts, and submit the ~~same~~ report to the ~~warden~~ secretary of corrections,
the sentencing court, and the Governor.

Section 20. That § 23A-27A-28 be amended to read as follows:

23A-27A-28. If the ~~physicians summoned~~ examination under § 23A-27A-27 ~~find~~ finds that
the defendant is pregnant the execution of the sentence ~~must~~ shall be suspended by the
sentencing court. The ~~warden shall forthwith transmit the report of the physicians to the~~
~~Governor and the defendant shall~~ may not be executed until a new warrant of death sentence and
execution is received from the ~~Governor~~ sentencing court so directing.

Section 21. That § 23A-27A-29 be amended to read as follows:

23A-27A-29. ~~In case~~ If the execution of a sentence is suspended pursuant to § 23A-27A-28,
as soon as the ~~Governor, as soon as he~~ sentencing court is satisfied ~~that~~ the defendant is no longer
pregnant, the sentencing court shall forthwith issue ~~his a~~ a warrant of death sentence and execution
appointing a week for her execution, pursuant to her sentence, ~~beginning.~~ The week for the
execution shall be within a period of not less than thirty nor more than ninety days from the date
of the warrant of death sentence and execution. In no case may the appointed week of execution
be sooner than the week appointed by the sentencing court pursuant to § 23A-27A-15.

Section 22. That § 23A-27A-30 be repealed.

~~23A-27A-30. If the physicians summoned pursuant to § 23A-27A-27 report that the female~~
~~defendant is not pregnant a copy of the report shall be transmitted by the warden to the Governor~~
~~but the same shall not work a stay or suspension of the execution of the sentence.~~

Section 23. That § 23A-27A-31 be amended to read as follows:

23A-27A-31. If the time period for the execution of any ~~convicted person~~ defendant in a
capital case has passed by reason of a stay of proceedings incident to appellate review or by
reason of the issuance of a writ of habeas corpus, certiorari, or other original remedial writ of the

1 Supreme Court, or for any other reason, ~~a judge of the circuit~~ the sentencing court shall issue a
2 warrant of death sentence and execution in accordance with § 23A-27A-15 appointing a new
3 ~~time period~~ week for the execution of the original sentence without requiring the ~~convicted~~
4 ~~person~~ defendant to be brought before the sentencing court. Upon its issuance, the clerk of the
5 court in which the sentence was pronounced shall immediately send a certified copy of the
6 warrant of death sentence and execution to all attorneys of record, to the warden ~~of the state~~
7 ~~penitentiary~~ having custody of the defendant, to the secretary of corrections, and to the Governor.
8 The warden shall execute the warrant of death sentence and execution accordingly. This
9 procedure applies to any case in which the time period for carrying out the original warrant of
10 death sentence and execution has elapsed without regard to whether the original warrant was
11 issued prior or subsequent to July 1, 1998.

12 Section 24. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read
13 as follows:

14 From the time of delivery to the penitentiary until the infliction of the punishment of death
15 upon the defendant, unless lawfully discharged from such imprisonment, the defendant shall be
16 segregated from other inmates at the penitentiary. No other person may be allowed access to the
17 defendant without an order of the trial court except penitentiary staff, Department of Corrections
18 staff, the defendant's counsel, members of the clergy if requested by the defendant, and members
19 of the defendant's family. Members of the clergy and members of the defendant's family are
20 subject to approval by the warden before being allowed access to the defendant.

21 Section 25. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read
22 as follows:

23 The name, address, qualifications, and other identifying information relating to the identity
24 of any person administering the intravenous injection under chapter 23A-27A are confidential.

1 Disclosure of the foregoing information may not be authorized or ordered. Disclosure of
2 confidential information pursuant to this section concerning the execution of an inmate under
3 chapter 23A-27A is a Class 2 misdemeanor.

4 Section 26. That § 23A-27A-32 be amended to read as follows:

5 23A-27A-32. The punishment of death shall be inflicted within the walls of some building
6 at the state penitentiary. The punishment of death shall be inflicted by the intravenous injection
7 of a substance or substances in a lethal quantity. The warden, subject to the approval of the
8 secretary of corrections, shall determine the substances and the quantity of substances used for
9 the punishment of death. An execution carried out by intravenous injection shall be performed
10 by ~~a person~~ persons trained to administer the injection who ~~is~~ are selected by the warden and
11 approved by the secretary of corrections. The ~~person~~ persons administering the intravenous
12 injection need not be ~~a physician~~ physicians, registered ~~nurse~~ nurses, licensed practical ~~nurse~~
13 nurses, or other medical ~~professional~~ professionals licensed or registered under the laws of this
14 or any other state. Any infliction of the punishment of death by intravenous injection of a
15 substance or substances in the manner required by this section may not be construed to be the
16 practice of medicine. Any pharmacist or pharmaceutical supplier is authorized to dispense to the
17 warden the substance or substances used to inflict the punishment of death ~~to the warden~~ without
18 prescription, for carrying out the provisions of this section, notwithstanding any other provision
19 of law.

20 Section 27. That § 23A-27A-34 be amended to read as follows:

21 23A-27A-34. The warden of the penitentiary shall request, by at least two days' previous
22 notice, the presence of the attorney general, the trial judge before whom the conviction was had
23 or the judge's successor in office, the state's attorney and sheriff of the county where the crime
24 was committed, ~~and not more than ten reputable adult citizens, including representatives of the~~

1 victim, at least one member of the news media, ~~to be selected by the warden at the execution. The~~
2 ~~warden shall arrange for the attendance of any prison guards and law enforcement officers the~~
3 ~~warden deems proper and a number of reputable adult citizens to be determined by the warden.~~
4 All witnesses and persons present at an execution are subject to approval by the warden.

5 Section 28. That § 23A-27A-35 be repealed.

6 ~~—23A-27A-35. The warden of the state penitentiary must also, at the request of the defendant,~~
7 ~~permit such ministers of the gospel, priests, or clergymen of any denomination as the defendant~~
8 ~~may desire, not exceeding two, to be present at the execution and any relatives or friends~~
9 ~~requested by the defendant not exceeding five.~~

10 Section 29. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read
11 as follows:

12 The warden shall arrange for the attendance of a person trained to examine the defendant and
13 pronounce death and for the attendance of such penitentiary staff, Department of Corrections
14 staff, and law enforcement officers as deemed necessary to perform the execution and maintain
15 security.

16 Section 30. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read
17 as follows:

18 The defendant is permitted to have up to five witnesses present at the execution. Witnesses
19 for the defendant may include counsel, members of the clergy, relatives, or friends.

20 Section 31. That § 23A-27A-36 be amended to read as follows:

21 23A-27A-36. The warden of the state penitentiary ~~shall~~ may not permit ~~no persons~~ any person
22 to be present at ~~such the~~ execution other than those designated in §§ 23A-27A-32, 23A-27A-34
23 and ~~23A-27A-35~~ sections 29 and 30 of this Act and ~~shall~~ may not permit the presence of any
24 person under the age of eighteen years, ~~unless a relative, and no relatives of tender years shall be~~

1 admitted.

2 Section 32. That § 23A-27A-37 be amended to read as follows:

3 23A-27A-37. ~~The~~ Prior to the announcement required in § 23A-27A-17, the scheduled day
4 and time fixed by the warden for the execution shall be kept secret and in no manner divulged
5 except privately to the persons ~~by him~~ invited or requested to be present as provided by §§ 23A-
6 27A-32, 23A-27A-34 and 23A-27A-35 sections 29 and 30 of this Act. It is a Class 2
7 misdemeanor for ~~such persons so invited or requested to be present~~ any person to divulge such
8 invitation to ~~any person or persons nor anyone or~~ in any manner disclose the scheduled day and
9 time of the execution prior to the announcement required in § 23A-27A-17.

10 Section 33. That § 23A-27A-41 be repealed.

11 ~~— 23A-27A-41. In case of the disability from illness or other sufficient cause of the warden to~~
12 ~~whom the death warrant is directed to be present and execute the same, it shall be the duty of the~~
13 ~~principal deputy warden or such other officer of the prison as may be designated by the warden~~
14 ~~to execute the warrant and to perform all other duties imposed upon the warden by this chapter.~~

15 Section 34. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read
16 as follows:

17 In case of disability of the warden to whom the warrant of death sentence and execution is
18 directed, the secretary of corrections shall appoint the deputy warden or such other officer of the
19 Department of Corrections as may be necessary to carry out the warrant of death sentence and
20 execution and to perform all other duties imposed upon the warden by this chapter.

21 Section 35. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read
22 as follows:

23 After the execution, the county coroner shall conduct a postmortem examination of the body
24 of the defendant. The county coroner shall report in writing the result of the examination, stating

1 the nature thereof and the finding made. The report shall be annexed to the certificate of
2 execution mentioned in section 39 of this Act and filed therewith.

3 Section 36. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read
4 as follows:

5 Following the death of the defendant by execution, the body may be subject to an autopsy
6 pursuant to § 24-1-27 and chapter 23-14. Any final autopsy report shall be annexed to and filed
7 with the certificate of execution mentioned in section 39 of this Act.

8 Section 37. That § 23A-27A-39 be amended to read as follows:

9 23A-27A-39. The After the postmortem examination and any autopsy, the body of the
10 defendant, unless claimed by some relative, shall be interred in a cemetery within the county
11 where the penitentiary is situated.

12 Section 38. That § 23A-27A-40 be repealed.

13 ~~23A-27A-40. The warden or prison officer attending the execution and in charge of the~~
14 ~~execution shall immediately prepare and sign a certificate and return setting forth the time, place,~~
15 ~~and manner of the execution, and that the defendant was executed in conformity to the judgment~~
16 ~~of the court and the provisions of this chapter. The warden or prison officer shall sign the~~
17 ~~certificate and return and shall also procure the same to be signed by all the persons present and~~
18 ~~witnessing the execution and shall file the certificate within ten days after the execution in the~~
19 ~~office of the clerk of the court where the trial and conviction of the defendant took place.~~

20 Section 39. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read
21 as follows:

22 The warden or corrections official attending and in charge of the execution shall prepare and
23 sign a certificate of execution setting forth the date, time, place, and manner of execution, and
24 that the defendant was executed in conformity to the judgment of the court and the provisions

1 of this chapter. The certificate of execution document shall be signed by each of the witnesses
2 of the execution attending as allowed in § 23A-27A-34 and section 30 of this Act. The warden
3 or corrections official shall cause the certificate of execution to be filed in the office of the clerk
4 of the sentencing court within ten days after the execution. The original or a certified copy of the
5 death certificate, postmortem examination, and any autopsy report shall be filed with the clerk
6 of the sentencing court within ten days of receipt by the warden or corrections official.

7 Section 40. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read
8 as follows:

9 Any person or party participating in good faith in the execution of an inmate under this
10 chapter is immune from any liability, civil or criminal, that might otherwise be incurred or
11 imposed, and has the same immunity for participation in any judicial proceeding resulting from
12 the execution. Immunity also extends in the same manner to any persons who in good faith
13 cooperate in the execution of an inmate under this chapter.

14 Section 41. That chapter 19-13 be amended by adding thereto a NEW SECTION to read as
15 follows:

16 The secretary of corrections, the warden of the penitentiary, penitentiary staff, and
17 Department of Corrections staff may not be examined as to communications made to them
18 concerning an execution of an inmate under chapter 23A-27A. The privilege described in this
19 section may be claimed by the secretary of corrections, the warden of the penitentiary,
20 penitentiary staff, Department of Corrections staff, or by any representative of any of the
21 foregoing to be examined and is binding on all of them. However, the secretary of corrections
22 and the warden of the penitentiary may personally waive the privilege described in this section.

23 Section 42. That chapter 23A-27A be amended by adding thereto a NEW SECTION to read
24 as follows:

1 As to any defendant who has been sentenced to death and who is awaiting execution prior
2 to July 1, 2008, the amendment and repeal of existing sections and enactment of new sections
3 in this Act do not impair or affect any act done, offense committed, or right accruing, accrued,
4 or acquired, or liability, penalty, forfeiture, or punishment incurred prior to July 1, 2008.
5 However, the provisions of existing statute may be asserted, enforced, prosecuted, or inflicted,
6 as fully and to the same extent as if the amendment and repeal of existing sections and enactment
7 of new sections in this Act had not been subsequently enacted.